

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY STAFFORD SCALES,

Defendant-Appellant.

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UNPUBLISHED

May 18, 2004

No. 246411

Wayne Circuit Court

LC No. 01-013625

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree murder, MCL 750.316(1)(a), two counts of felony-murder, MCL 750.316(1)(b), one count of armed robbery, MCL 750.529, one count of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. A jury found defendant guilty of armed robbery, MCL 750.529, and the trial court sentenced him to life in prison. We affirm defendant's conviction, but remand for resentencing before a different judge.

Defendant's only challenge to his conviction is that the trial court erred in refusing to instruct the jury on the defense of abandonment. We disagree. Claims of instructional error are reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

In *People v Kimball*, 109 Mich App 273; 311 NW2d 343 (1981), modified 412 Mich 890 (1981), this Court recognized that "voluntary abandonment is an affirmative defense to a prosecution for criminal attempt." *Id.* at 286. Here, defendant was not charged with criminal attempt, but rather completed offenses. Consequently, defendant was not entitled to an abandonment instruction.

Defendant also challenges the life sentence that the trial court imposed for the armed robbery conviction. Defendant maintains that he is entitled to resentencing before a different judge because the trial court disregarded the sentencing guidelines range of 108 to 180 months and failed to state sufficient substantial and compelling reasons for the imposed departure, and erroneously assumed that defendant was guilty of murder. Because the trial court disregarded the sentencing guidelines for armed robbery and in effect sentenced defendant as if he were convicted of murder and assault with intent to murder, we agree that defendant is entitled to resentencing before a different judge.

We review de novo whether the trial court has properly applied the statutory sentencing provisions. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

At sentencing, the trial court recited its interpretation of the evidence presented at trial and concluded that defendant “is just as guilty as the shooter or shooters, if he is not the shooter himself. And it doesn’t make any difference.” Further, the court stated that “I don’t feel constrained by any findings of the jury as to what my sentence is going to be,” and concluded by stating that “[t]he [c]ourt is going to completely ignore the guidelines.”

When sentencing a defendant, the sentencing court is not permitted to independently find that the defendant committed a crime that the jury acquitted him of and sentence the defendant on the basis of that finding. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). In this case, that is exactly what occurred. The record plainly reveals that based on the evidence it heard during the trial, the trial court, unlike the jury, found defendant guilty of two murders and an assault with intent to murder. Further, the record establishes that the trial court imposed a life sentence for the armed robbery conviction as the means to effectuate a sentence upon defendant for those charges. Thus, the trial court’s life sentence is not based on substantial and compelling reasons for a departure from the guidelines sentencing range, MCL 769.34(2), (3), *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003), or on grounds that applicable offense variables (OV) such as discharging a firearm at or toward a human being (OV 1), MCL 777.31(1)(a), or a victim was killed (OV 3), MCL 777.33(1)(a), or a victim was treated with sadism, torture, or excessive brutality (OV 7), MCL 777.37(1)(a), or the number of victims was between two to nine (OV 9), MCL 777.39(1)(c), were inadequately weighed. MCL 769.34(3)(b), *Babcock, supra*. Consequently, we must remand for resentencing. MCL 769.34(11), *Babcock, supra* at 273.

Further, we conclude that reassignment to a different judge is necessary because the trial judge’s comments at sentencing indicate that that judge would reasonably be expected to have substantial difficulty in putting aside his strongly held views and findings in this case. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). Additionally, reassignment is advisable to preserve the appearance of justice and would not entail waste or duplication that is out of proportion to the gain in preserving the appearance of fairness. *Id.*

Affirmed, but remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Joel P. Hoekstra  
/s/ Kirsten Frank Kelly